

NOTICE PUBLICATION/REGULATIONS SUBMISSION

STD. 400 (REV. 01-09)

OAL FILE NUMBERS Z-	NOTICE FILE NUMBER	REGULATORY ACTION NUMBER	EMERGENCY NUMBER 2010-0225-02E
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For use by Office of Administrative Law (OAL) only

2010 FEB 25 AM 11:45
OFFICE OF
ADMINISTRATIVE LAW

NOTICE

REGULATIONS

AGENCY WITH RULEMAKING AUTHORITY
Food and Agriculture

AGENCY FILE NUMBER (if any)
PH10020

A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)

1. SUBJECT OF NOTICE		TITLE(S)	FIRST SECTION AFFECTED	2. REQUESTED PUBLICATION DATE
3. NOTICE TYPE <input type="checkbox"/> Notice re Proposed <input type="checkbox"/> Regulatory Action <input type="checkbox"/> Other		4. AGENCY CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)
OAL USE ONLY	ACTION ON PROPOSED NOTICE <input type="checkbox"/> Approved as Submitted <input type="checkbox"/> Approved as Modified <input type="checkbox"/> Disapproved/Withdrawn		NOTICE REGISTER NUMBER	PUBLICATION DATE

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S) Oak Mortality Disease Control	1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S)
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2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) (Including title 26, if toxics related)				
<table border="1"> <tr> <td rowspan="3">SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)</td> <td>ADOPT</td> </tr> <tr> <td>AMEND 3700(c)</td> </tr> <tr> <td>REPEAL</td> </tr> </table>	SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)	ADOPT	AMEND 3700(c)	REPEAL
SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)		ADOPT		
		AMEND 3700(c)		
	REPEAL			
TITLE(S) 3				

3. TYPE OF FILING			
<input type="checkbox"/> Regular Rulemaking (Gov. Code §11346)	<input type="checkbox"/> Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code §§11346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute.	<input type="checkbox"/> Emergency Readopt (Gov. Code, §11346.1(h))	<input type="checkbox"/> Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100)
<input type="checkbox"/> Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §511349.3, 11349.4)	<input type="checkbox"/> Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1)	<input type="checkbox"/> File & Print	<input type="checkbox"/> Print Only
<input checked="" type="checkbox"/> Emergency (Gov. Code, §11346.1(b))			
<input type="checkbox"/> Other (Specify) _____			

4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, §44 and Gov. Code §11347.1)

5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100)			
<input type="checkbox"/> Effective 30th day after filing with Secretary of State	<input type="checkbox"/> Effective on filing with Secretary of State	<input type="checkbox"/> \$100 Changes Without Regulatory Effect	<input checked="" type="checkbox"/> Effective other (Specify) March 31, 2010

6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY			
<input type="checkbox"/> Department of Finance (Form STD. 399) (SAM §6660)	<input type="checkbox"/> Fair Political Practices Commission	<input type="checkbox"/> State Fire Marshal	
<input type="checkbox"/> Other (Specify) _____			

7. CONTACT PERSON Stephen S. Brown	TELEPHONE NUMBER (916) 654-1017	FAX NUMBER (Optional) (916) 654-1018	E-MAIL ADDRESS (Optional) sbrown@cdfa.ca.gov
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8. I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.

SIGNATURE OF AGENCY HEAD OR DESIGNEE 	DATE 2/25/10
TYPED NAME AND TITLE OF SIGNATORY Nathan Dechoretz, Deputy Secretary for Administration and Finance	

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In Title 3, Division 4, Chapter 4, amend Section 3700 Subsection (c) to read:

Section 3700. Oak Mortality Disease Control.

(c) Articles and Commodities Covered. The following are declared to be hosts or potential carriers of the pest:

(1) Plants and plant parts (except acorns or seed and a * includes the bole) of:

Acer macrophyllum (bigleaf maple)
Acer pseudoplatanus (planetree maple)*
Adiantum aleuticum (Western maidenhair fern)
Adiantum jordanii (California maidenhair fern)
Aesculus californica (California buckeye)
Aesculus hippocastanum (horse chestnut)*
Arbutus menziesii (madrone)
Arctostaphylos manzanita (manzanita)
Calluna vulgaris (Scotch heather)
Camellia spp. (includes all species, hybrids and cultivars)
Castanea sativa (sweet chestnut)
Fagus sylvatica (European beech)*
Frangula californica (= *Rhamnus californica*) (California coffeeberry)
Frangula purshiana (= *Rhamnus purshiana*) (cascara)
Fraxinus excelsior (European ash)*
Griselinia littoralis (Griselinia)
Hamamelis virginiana (witch hazel)
Heteromeles arbutifolia (Toyon or Christmas berry)
Kalmia spp. (includes all species, hybrids and cultivars)
Laurus nobilis (bay laurel)
Lithocarpus densiflorus (tanoak)*
Lonicera hispidula (California honeysuckle)
Magnolia doltsopa (= *Michelia doltsopa*) (Michelia)

Maianthemum racemosum (= *Smilacina racemosa*, false
Solomon's seal)

Parrotia persica (Persian ironwood)

Photinia fraseri (red tip or Fraser's photinia)

Pieris spp. (includes all species, hybrids and cultivars)

Pseudotsuga menziesii var. *menziesii* and all nursery grown *P.*
menziesii (Douglas-fir)

Quercus agrifolia (coast live oak)*

Quercus cerris (European turkey oak)*

Quercus chrysolepis (canyon live oak)*

Quercus falcata (Southern red oak)*

Quercus ilex (Holm oak)

Quercus kelloggii (California black oak)*

Quercus parvula var. *shrevei* and all nursery grown *Q. parvula*
(Shreve's oak)*

Rhododendron species (azaleas and rhododendrons)

Rosa gymnocarpa (wood rose)

Salix caprea (goat willow)

Sequoia sempervirens (coast redwood)

Syringa vulgaris (lilac)

Taxus baccata (European yew)

Trientalis latifolia (Western star flower)

Umbellularia californica (California bay laurel)

Vaccinium ovatum (huckleberry)

Viburnum spp. (All species of viburnum);

(2) Associated articles (nursery stock) of the following plants:

Abies concolor (white fir)

Abies grandis (grand fir)

Abies magnifica (red fir)

Acer circinatum (vine maple)

Acer davidii (striped bark maple)
Acer laevigatum (evergreen maple)
Arbutus unedo (strawberry tree)
Arctostaphylos columbiana (manzanita)
Arctostaphylos uva-ursi (Kinnikinnick)
Ardisia japonica (Ardisia)
Berberis diversifolia (= *Mahonia aquifolium*) (Oregon grape)
Calycanthus occidentalis (spicebush)
Castanopsis orthacantha (Castanopsis)
Ceanothus thyrsiflorus (blue blossom)
Cercis chinensis (Chinese redbud)
Choisya ternate (Mexican orange)
Cinnamomum camphora (camphor tree)
Clintonia andrewsiana (Andrew's clintonia bead lily)
Cornus kousa (Kousa dogwood)
Cornus kousa x *Cornus capitata* (Cornus Norman Haddon)
Corylopsis spicata (spike winter hazel)
Corylus cornuta (California hazelnut)
Daphniphyllum glaucescens
Distylium myricoides (myrtle-leaved distylium)
Drimys winteri (Winter's bark)
Dryopteris arguta (California wood fern)
Eucalyptus haemastoma (Scribbly gum)
Euonymus kiautschovicus (spreading euonymus)
Fraxinus latifolia (Oregon ash)
Garrya elliptica (silk tassel tree, coast silk tassel)
Gaultheria shallon (salal, Oregon wintergreen)
Hamamelis x *intermedia* [(*H. mollis* and *H. japonica*) (hybrid -
 witchhazel)]
Hamamelis mollis (Chinese witch-hazel)

Ilex aquifolium (European holly)
Ilex purpurea (Oriental holly)
Kalmia angustifolia (sheep laurel)
Leucothoe axillaries (fetter-bush, dog hobble)
Leucothoe fontanesiana (drooping leucothoe)
Lithocarpus glaber (Japanese oak)
Loropetalum chinense (Loropetalum)
Magnolia cavaleri (Michelia)
Magnolia denudata x *salicifolia* (magnolia)
Magnolia ernestii (= *Michelia wilsonii*) (Michelia)
Magnolia figo (banana shrub)
Magnolia foveolata (Michelia)
Magnolia grandiflora (Southern magnolia)
Magnolia kobus (kobus magnolia)
Magnolia liliiflora (= *M. quinquepetala*) (purple magnolia)
Magnolia maudiae (= *Michelia maudiae*) (Michelia)
Magnolia salicifolia (= *M. proctoriana*) (anise magnolia)
Magnolia stellata (star magnolia)
Magnolia x *loebneri* (Loebner magnolia)
Magnolia x *soulangeana* (saucer magnolia)
Magnolia x *thompsoniana* (*M. tripetala* and *M. virginiana*)
(magnolia)
Manglietia insignis (red lotus tree)
Nerium oleander (oleander)
Nothofagus obliqua (Roble beech)
Osmorhiza berteroi (sweet Cicely)
Osmanthus delavayi (Delavay Osmanthus)
Osmanthus decorus [(= *Phillyrea decora*; = *P. vilmoriniana*)
(Osmanthus)]
Osmanthus fragrans (sweet olive)

Osmanthus heterophyllus (holly olive)
Parakmeria lotungensis (Eastern joy lotus tree)
Physocarpus opulifolius (ninebark)
Pittosporum undulatum (Victorian box)
Prunus laurocerasus (English laurel)
Prunus lusitanica (Portuguese laurel cherry)
Pyracantha koidzumii (Formosa firethorn)
Quercus acuta (Japanese evergreen oak)
Quercus petraea (Sessile oak)
Quercus rubra (Northern red oak)
Ribes laurifolium (bayleaf currant)
Rosa -cultivars: Royal Bonica (tagged: "MEI modac"), Pink
 Meidiland (tagged: "MEI poque"), Pink Sevillana (tagged:
 "MEI geroka")
Rosa rugosa (rugosa rose)
Rubus spectabilis (salmonberry)
Schima wallichii (Chinese guger tree)
Taxus brevifolia (Pacific yew)
Taxus x media (Yew)
Torreya californica (California nutmeg)
Toxicodendron diversilobum (poison oak)
Vaccinium myrtillus (bilberry)
Vaccinium vitis-idaea (cowberry, lingon berry, mountain cherry)
Vancouveria planipetala (Redwood ivy)

(3) Unprocessed wood and wood products (including but not limited to bark chips, mulch and firewood- except when completely free of bark) of the plants listed in paragraph (c)(1) as bole hosts and plant products of the plants in paragraph (c)(1), including but not limited to dried or preserved wreaths;

(4) Any other product, article or means of conveyance when it is determined by the secretary, based upon generally accepted scientific principles, that it presents a risk of

spreading the pest because it is a host or potential carrier of the pest.

continued

Note: Authority: Sections 407, 5321 and 5322, Food and Agricultural Code.

Reference: Sections 24.5, 5321 and 5322, Food and Agricultural Code.

February 22, 2010

FINDING OF EMERGENCY

The Secretary of the Department of Food and Agriculture finds that an emergency exists, and that the foregoing adoption of a regulation is necessary for an immediate action to avoid serious harm to the public peace, health, safety or general welfare, within the meaning of Government Code Section 11342.545 and Public Resources Code Section 21080. The Department does not have a record of any person requesting a notice of regulatory actions under Government Code Section 11346.4(a)(1). Therefore, the provisions of Government Code Section 11346.1(a)(2) do not appear to be applicable to this emergency action as no one has requested such notice.

Description of Specific Facts Which Constitute the Emergency:

The Department of Food and Agriculture has found that oak mortality disease (sudden oak death) caused by a fungus, *Phytophthora ramorum*, presents a clear and present danger to the native stands of oak and other trees, the nursery industry, other agricultural commodities and plant life (including ornamental plantings) of California. Section 3700 implements a program to arrest the artificial spread of the disease. Continued action is necessary to contain and minimize the destructive impact of this pest and disease at the earliest possible time. On April 9, 2004, the Administrator of the United States Department of Agriculture (USDA), Animal and Plant Health Inspection Services (APHIS) issued the first emergency order restricting the interstate movement of nursery stock from California nurseries located outside the area regulated under Section 3700. On April 22, 2004, USDA, APHIS issued a new order that replaced that issued on April 9, 2004. On April 23, 2004, USDA, APHIS issued a clarification of its April 22, 2004 order. Through this last federal emergency order and its subsequent clarification, the USDA, APHIS identified additional plant species as regulated associated articles and as such, these associated articles are prohibited interstate movement from all California nurseries unless properly certified under the provision of the federal emergency order.

Since April 2004, the USDA, APHIS has issued a series of federal emergency orders that amended the articles regulated including on: 1) August 5, 2004, 2) December 21, 2004, 3) August 3, 2005, 4) September 14, 2005, 5) November 15, 2005 (effective November 28, 2005), 6) February 10, 2006 (effective February 20, 2006), 7) March 14, 2006 (effective March 31, 2006), 8) July 17, 2006 (effective August 1, 2006), 9) September 21, 2006 (effective

October 10, 2006) 10) a federal rule (effective February 27, 2007), a federal order (effective September 7, 2007), a federal order (effective January 1, 2008), a federal order (effective April 1, 2008) and a federal order (effective June 9, 2008). As a result, it was necessary to make emergency amendments to the State's regulation governing the intrastate movement of hosts and associated articles (nursery stock) to be consistent with these federal orders and the federal rule. Without a parallel State regulation that is substantially the same as the federal domestic quarantine and related federal orders, the USDA cannot regulate less than the entire State.

The USDA has issued new federal order on February 22, 2010, which will be effective March 31, 2010. The USDA deemed this action necessary to amend its "associated hosts" list with ten additional plant taxa that can be infected by *P. ramorum*.

This federal order will specifically affect the interstate movement of nursery stock from several states, including California. Under authority of this federal order, nurseries operating under a compliance agreement may continue to ship "Associated Plants" including these newly listed plants. Any nurseries containing these newly listed associated plants must be properly inspected, sampled and tested and placed under a Compliance Agreement to be able to move plants interstate. This federal order will add ten new plant species, *Choisya ternate* (Mexican orange), *Cornus kousa* (Kousa dogwood), *Daphniphyllum glaucescens*, *Ilex aquifolium* (European holly), *Lithocarpus glaber* (Japanese oak), *Magnolia cavaleri* (Michelia), *Magnolia foveolata* (Michelia), *Ribes laurifolium* (bayleaf currant), *Vaccinium myrtillus* (bilberry) and *Vaccinium vitis-idaea* (cowberry, lingon berry, mountain cherry) to its "Plants Associated with *Phytophthora ramorum*" list. Therefore, to ensure harmonization with the federal order, these plants are also being added to Section 3700(c) as "associated articles."

As this federal order will become effective on March 31, 2010, the Department is proposing these emergency amendments to Section 3700(c) to continue to provide the necessary regulatory framework for a State program to continue to arrest the intrastate and interstate spread of this disease and be in compliance with the federal order. It should be noted that these ten additional "Associated Host Plants" and nomenclature changes are already listed by the USDA at the following website: http://www.aphis.usda.gov/plant_health/plant_pest_info/pram/.

In order to prepare the affected industries, the Department intends to also issue a Phytosanitary Advisory to all county agricultural commissioners concerning the requirements of this upcoming federal order.

The Department proposes to amend this regulation because it is necessary to continue to have authority for an established statewide program in order to arrest the artificial spread of the disease to additional areas and harmonize the State's regulation governing the intrastate movement of nursery stock with the latest federal order that governs the interstate movement of California nursery stock. Immediate amendment of this regulation is necessary to mitigate the effects of this disease on the agricultural industry, which includes native tree stands. Additionally, it is necessary to immediately amend this regulation to avoid more stringent federal restrictions being placed against the State to prevent the interstate movement of articles and commodities that may carry *Phytophthora ramorum*. The implementation of this proposed regulatory action by March 31, 2010, is necessary to harmonize it with the federal order and prevent the USDA, APHIS from considering the entire state as infested with *Phytophthora ramorum*, rather than just the current 14 regulated counties. If this were to occur, there would likely be additional detrimental quarantine requirements directed against California commodities by our international trade partners.

The Department has determined that *Phytophthora ramorum* is a serious forest pest for which control is required to prevent further spread and harm to forests, parks, commercial and urban landscapes, and watersheds. This disease is known to occur in 14 California counties. Oak mortality disease is serious due to the fact that it kills tanoak, coast live oak, and black oak trees. The pest has been confirmed as infecting Shreve's oak and non-oak species such as rhododendron, huckleberry, bigleaf maple, California buckeye, California coffeeberry, manzanita, and toyon and other hosts causing foliar and stem disease symptoms.

Phytophthora ramorum has the capability of causing significant irreparable harm to California's agricultural industry and environment. While the Department's compliance with the California Administrative Procedure Act and the California Environmental Quality Act (CEQA) are separate actions, they can be interrelated. Although adoption of specific regulatory authority can be the

beginning of a project and therefore covered by CEQA, this regulation, for the reasons already set forth, constitutes a specific act necessary to prevent or mitigate an emergency as authorized by Public Resources Code section 21080, subdivision (b) (4) and Title 14, California Code of Regulations Section 15269, subdivision (c). The regulation is also an action required for the preservation of the environment and natural resources as authorized by Title 14, California Code of Regulations, sections 15307 and 15308.

The proposed emergency amendments of Section 3700(c) will establish ten new associated hosts that are regulated. To protect California's agricultural industry, it is necessary to immediately regulate movement of hosts and potential carriers that may transfer the pest from the infested area. Therefore, it is necessary to amend Section 3700(c) on an emergency basis in order to have the State regulation effective on March 31, 2010; the same day as the federal order.

Authority and Reference Citations

Authority: Sections 407, 5321 and 5322, Food and Agricultural Code.

Reference: Sections 24.5, 5321 and 5322, Food and Agricultural Code.

Informative Digest

Existing law obligates the Department of Food and Agriculture to protect the agricultural industry in California and prevent the spread of injurious pests (Food and Agricultural Code, Sections 401 and 403). Existing law also provides that the Secretary may establish, maintain, and enforce such regulations as he deems necessary to prevent the spread of pests to protect California's agricultural industry (Food and Agricultural Code, Section 5322).

Section 3700. Oak Mortality Disease Control.

The proposed emergency amendment of Section 3700(c) will establish *Choisya ternate* (Mexican orange), *Cornus kousa* (Kousa dogwood), *Daphniphyllum glaucescens*, *Ilex aquifolium* (European holly), *Lithocarpus glaber* (Japanese oak), *Magnolia cavaleri* (Michelia), *Magnolia foveolata* (Michelia), *Ribes laurifolium* (bayleaf currant), *Vaccinium myrtillus* (bilberry) and

Vaccinium vitis-idaea (cowberry, lingon berry, mountain cherry) as associated articles under the articles and commodities covered by the regulation. The effect of the changes to the regulation is to provide authority for the State to regulate movement of these new “associated hosts” from the regulated area to prevent artificial spread of the pest to non-infested areas to protect California's agricultural industry and the environment.

Mandate on Local Agencies or School Districts

The Department of Food and Agriculture has determined that Section 3700 does not impose a mandate on local agencies or school districts, except that the agricultural commissioner of a county under regulation has a duty to enforce it. No reimbursement is required under Section 17561 of the Government Code because the 14 affected agricultural commissioners requested that they be added to the regulation.

Cost Estimate

The Department has also determined that no savings or increased costs to any state agency, no reimbursable costs or savings under Part 7 (commencing with Section 17500) of Division 4 of the Government Code to local agencies or school districts, no nondiscretionary costs or savings to local agencies or school districts, and no costs or savings in federal funding to the State will result from the proposed action.